No. 89-1799

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JEFFREY M. MASSON,

Petitioner,

v.

THE NEW YORKER MAGAZINE, INC., ALFRED A. KNOPF, INC. and JANET MALCOLM,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF JOURNALISTS AND ACADEMICS CONCERNED ABOUT MEDIA INTEGRITY IN SUPPORT OF PETITIONER JEFFREY M. MASSON

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MOTION OF JOURNALISTS AND ACADEMICS CONCERNED ABOUT MEDIA INTEGRITY FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER JEFFREY M. MASSON

Journalists and Academics Concerned About Media Integrity, a voluntary, non-incorporated, association of individuals assembled exclusively for the purposes of the instant submission, hereby moves this Court, pursuant to Supreme Court Rule 37.2 for leave to file the annexed brief *amicus curiae* in support of Petitioner Jeffrey M. Masson. Counsel to *amicus curiae*, the Center for Individual Rights, has sought permission from the parties to this filing.* Counsel for Petitioner has consented to the filing of *amicus*'s brief; counsel for Respondents has refused.

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* The Center for Individual Rights is a non-profit, public interest law firm which provides representation to deserving individuals and groups in cases raising significant legal policy issues. The Center is incorporated as a 501(c)(3) charitable organization under the Internal Revenue Code.

IDENTIFICATION OF *AMICUS CURIAE*

Journalists and Academics Concerned About Media Intergity comprises the following individuals:

Peter Collier is a free-lance writer and the co-author, along with David Horowitz, of several widely acclaimed books, including biographies on the Rockefeller, Kennedy, and Ford families.

John De Mott is a Professor of Journalism at Memphis State University. Before joining the Memphis State faculty, in 1980, he taught journalism at Temple University, Northern Illinois University, Northwestern University's Medill School of Journalism and the University of Kansas. Before becoming an educator, Dr. De Mott served 16 years as a news reporter and editor for the Kansas City Star and Times.

Joseph C. Goulden is director of media analysis for Accuracy in Media in Washington, D.C. He is the author of 16 non-fiction books. Prior to becoming a full-time writer, Mr. Goulden worked for newspapers for ten years, lastly as Washington bureau chief of *The Philadelphia Inquirer*. Mr. Goulden has received numerous newspaper and literary awards.

William E. Lee, Ph.D., is a professor at the Henry W. Grady College of Journalism and Mass Communication at the University of Georgia. Professor Lee has testified as an expert witness in many trials concerning journalistic practices and has written extensively on press freedom in journals such as *The Supreme Court Review*, the *Vanderbilt Law Review*, the *George Washington Law Review*, and the *Iowa Law Review*.

Clark Mollenhoff is a Professor of Journalism and Law at Washington and Lee University. A former Washington correspondent who has practiced journalism for over forty years, he is the recipient of numerous First Amendment awards for distinguished reporting including the John Peter Zenger award (U. Ariz., 1962), the William Allen White Memorial award (U. Kansas, 1964), and the National American Legion Fourth Estate award (1965). In 1958, Mr. Mollenhoff was awarded the Pulitzer Prize for national reporting.

Marvin Olasky, Ph.D., is an associate Professor of Journalism at the University of Texas, Austin. He has written several books about the media, including *Prodigal Press* and *Central Ideas in the Development of American Journalism*. Professor Olasky is currently a Bradley Resident Scholar at the Heritage Foundation in Washington, D.C.

R. Emmett Tyrrell, Jr. is the author of two books on contemporary politics, *The Liberal Crack-Up* and *Public Nuisances*. He is the editor-in-chief of *The American Spectator* magazine and a nationally syndicated columnist with King Features Syndicate.

Robert Poole is the publisher of *Reason* magazine, a monthly journal of news and political opinion. Prior to becoming the editor of *Reason*, Mr. Poole worked for twelve years as its editor-in-chief. He is a former syndicated newspaper columnist.

NATURE OF *AMICUS*'S INTEREST

Amicus consists of journalists and academics who are seriously concerned about media integrity in the wake of the Ninth Circuit's holding in this case. They believe that the decision below has far-reaching implications for journalists, public figures, and the public at-large across the country, not only in those states to which the Ninth Circuit's jurisdiction extends.

A constitutional right to manufacture defamatory quotations is not essential to operation of a free press. To the contrary, it threatens vital First Amendment values and erodes public confidence in the press. To the extent that *amicus*'s members practice the journalistic profession, the ruling below has a direct impact upon them and upon *their* credibility as writers.

As responsible writers and journalists, *amicus*'s members are further concerned that the Ninth Circuit's hold-

ing unnecessarily denigrates the individual's reputational interest, an interest which this Court has recently reaffirmed to be at the core of notions of human dignity, *Milkovich v. Lorain Journal Co.*, 58 U.S.L.W. 4846, 4851 (June 21, 1990), citing *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966) (Stewart, J., concurring).

Permitting writers to escape potential legal liability for deliberately altered quotations which injure a person's reputation is to countenance "the use of the known lie as a tool," a result which this Court has repeatedly declared to be "at odds with . . . the orderly manner in which economic, social, or political change is effected." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1965).

As experienced journalists and distinguished academics who are familiar with this Court's First Amendment jurisprudence, *amicus*'s members strongly support the right of free speech. However, they also believe reputational interests are worthy of legal protection. Theirs is a balanced perspective which is oftentimes lacking in briefs filed with this Court by news organizations or other media groups. Consequently, they believe that the filing of this brief will bring relevant legal and factual matter to the attention of this Court that will not otherwise be taken into consideration.

For the foregoing reasons, Journalists and Academics Concerned About Media Integrity respectfully requests that this Court grant its motion for leave to participate as *amicus curiae*.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF JOURNALISTS AND ACADEMICS CONCERNED ABOUT MEDIA INTEGRITY IN SUPPORT OF PETITIONER JEFFREY M. MASSON

INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* are set forth in the foregoing Motion for Leave to File a Brief *Amicus Curiae*.

STATEMENT OF THE CASE

Amicus adopts the statement of the case provided by Petitioner Jeffrey M. Masson in his petition for certiorari.

SUMMARY OF ARGUMENT

This case presents the important question of whether the First Amendment protects journalists who libel public figures through the intentional use of fictionalized quotations. Beyond its importance to the press and to public figures whose reputations may be injured in this fashion, this question is of vital concern to the public. As Judge Kozinski recognized, extending First Amendment protection to journalists who deliberately distort what someone else has said deceives readers about the author's editorial role and thereby corrupts the marketplace of ideas. If the First Amendment may be so expansively interpreted, as it was below, to allow an author to alter another person's remarks with virtual immunity from suit, it will afford journalists not only the opportunity to assail the reputations of public figures with impunity, but also the opportunity to deceive the reading public.

The Ninth Circuit has promulgated the novel constitutional rule that an intentionally false and defamatory statement which is published in the form of a fictionalized quotation is not actionable if it is merely a "rational interpretation," or does not "alter the substantive content," of remarks actually made by a public figure. In so holding, the court of appeals expressly found it to be irrelevant that the Petitioner might be able to convince a jury on the basis of testimonial and documentary evidence that the fictionalized quotations were published with actual malice. By granting writers an absolute immunity to print knowing or reckless lies, the lower court's ruling stands in direct and open conflict with past libel rulings of this Court admitting of no exception to the requirement that *all* defamatory falsehoods made with actual malice are actionable.

Reasonable people can and do differ over the appropriate level of First Amendment protection that courts should extend to writers who publish false statements "in

order to protect speech that matters." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). But no one can seriously dispute that the Ninth Circuit's ruling, which extends virtually absolute First Amendment protection to deliberately manufactured quotations, is an important question deserving of review.

ARGUMENT

I. THE HOLDING BELOW DISSERVES IMPORTANT FIRST AMENDMENT VALUES.

The Ninth Circuit's ruling unjustly devalues the legitimate reputational interests of Petitioner and similarly situated public figures. *See infra* at 12-13. By permitting false statements to be published with impunity, the ruling also disserves important First Amendment values retained by the public and by individuals to whom false quotations are attributed. *See, e.g., Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776-777 (1984) ("False statements of fact harm both the subject of the falsehood *and* the readers of the statements") (emphasis in original).

A. The Ninth Circuit's Ruling Reduces The First Amendment Interests Of The Reading Public And Corrupts The Marketplace Of Ideas.

The public has an interest in receiving a broad range of unadulterated ideas. Free expression has been valued as "not only an aspect of individual liberty—and thus a good unto itself—but also [as] . . . essential to the common quest for truth and the vitality of society as a whole." *Bose v. Consumers Union of United States*, 466 U.S. 485, 503-4 (1984).

The goals of truth and enlightenment are best achieved when ideas are freely traded in the "competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). However, the Ninth Circuit's holding corrupts the marketplace of ideas and

diminishes the public's First Amendment interest in robust debate in two ways. First, it confers vast immunity on writers to circulate false statements of fact. Such falsehoods, which this Court has described as valueless, "interfere with the truthseeking function of the marketplace of ideas." *Falwell v. Flynt*, 108 S.Ct. 876, 880 (1988). *See also, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 733 (1985) (". . . it makes no sense to give the most protection to those publishers who reach the most readers and therefore pollute the channels of communications with the most misinformation and do the most damage to private reputation.") (White, J., concurring).

Second, the ruling allows writers to exercise "an unjustified monoply" in the marketplace of ideas. App. A at A-48 (Kozinski, J., dissenting). Under the lower court's rule, a writer purporting to quote a public figure, is virtually free to control the speaker's expression of his ideas and the public perception of how those ideas are received so long as the fictionalized quotations employed are "rational interpretations" of what the speaker has actually said. The First Amendment commands no such result.[1]

Justice Brennan has recently noted that when a writer uses conjectural or cautionary language he intends to alert readers that the statements he publishes are not to be taken as fact.

[1] Experience teaches that the truth rarely catches up to a lie. Although never entirely adequate, the law of defamation exists in order to remedy this situation by providing vindication and redress when a person's reputation is injured because of lies. As noted below, the principal reason the First Amendment limits the full operation of state libel laws is so that the press may avoid the stifling effect of massive liability. *Infra* at 10. A secondary reason is to protect journalists from simple, "good faith" errors of fact. *New York Times v. Sullivan*, 367 U.S. 254, 279 (1964). Neither of these two important First Amendment interests is served by extending protection to false, intentionally altered quotations.

> Conjecture, when recognizable as such, alerts the audience that the statement is one of belief, not fact. The audience understands that the speaker is merely putting forward a hypothesis. Although the hypothesis involves a factual question, it is understood as the author's best guess.

Milkovich v. Lorain Journal Co., 58 U.S.L.W. 4846, 4853, fn. 5 (June 21, 1990) (Brennan, J., dissenting).

In much the same way, a writer's use of quotation marks unequivocally alerts readers to expect factual statements or opinions actually uttered by the quoted speaker. No reasonable reader can fail to believe that he is being presented with a person's exact statements when he encounters these punctuation signs.[2] The Ninth Circuit's ruling turns this common sense expectation on its head. It permits, and indeed encourages, a writer to work significant alterations in a speaker's language. However, the public has an interest in having a person's statements and ideas expressed accurately and in the original words.

At the same time, the underlying rationale for insulating the press from liability loses its force in a context such as the instant one, where Respondents have distorted and fabricated another person's speech. Communicators have been afforded special constitutional protections in the libel arena precisely because of the instrumental role they play in creating and maintaining the "marketplace" of ideas.

When members of the press substitute their own voices for those of the individuals they are purportedly quoting,

[2] Most people speak less carefully than they write. For this reason, journalists occasionally "alter" an interviewed person's remarks in order to remove hesitations, stammerings, or syntactical lapses that would make the speaker appear less than intelligent. Thus the public may not always receive a speaker's unadorned statements. However, "cleaning up" quotations is an accepted journalistic convention as long as the quotations altered in this fashion remain faithful to the meaning intended by the speaker.

they are no longer serving their intended role of facilitating the widest possible dissemination of information from diverse sources. Instead of contributing to robust debate they are polluting the marketplace of ideas. Such practices do not serve the purpose of the First Amendment "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . ." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 388, 390 (1969).

When exposed or given judicial sanction—as each occurred here—the deceptive practice of fictionalizing quotations also lessens public confidence in the press. This is of particular concern to *amicus* made up, as it is, of writers and journalists. When the members of the press intentionally distort an individual's quotation, they betray the public confidence in the press and impede public debate. The Ninth Circuit's holding is thus inimical to this Court's reliance on the press as a reliable conduit of ideas.

B. The Ruling Below Improperly Diminishes The First Amendment Interests Of Speakers To Employ Words Of Their Own Choice.

One premise of the First Amendment is that freedom of expression facilitates individual self-fulfillment. *See Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., dissenting); "Thought and communication are the fountainhead of all expression of the individual personality." T. Emerson, A System of Freedom of Expression, 9 (New York, Random House 1970).

A speaker's choice of words is a manifestation of his personality. When a quotation is altered in substantive content, or entirely fabricated, a writer strips the expression of the speaker's distinctiveness and replaces it with his own. Permitting a writer to alter another person's quotations thereby diminishes the speaker's reputational interest in presenting an image of himself to the public that *he* believes to be proper.

To be sure, "selecting the words used to describe a particular event is not always a precise science. . . ." For this reason, "[t]he first amendment fully protects [an author's] prerogative" to report on ambiguous events as he or she wishes. App. A at A-56. (Kozinski, J., dissenting.) However, this is quite a different matter from engaging in "personality alteration" through quotation fictionalization.

A speaker imparts his individuality though the words he chooses. By using of quotation marks, a writer purports to convey the words and personality of another speaker. To tamper with a quotation is thus to invade and harm not only a person's reputational interests but his interest in the self-expression of his thoughts:

> The idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression is transparently fallacious. A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image.

FCC v. Pacifica Foundation, 438 U.S. 726, 773 (1978) (Brennan, J., dissenting).

In summary, the Ninth Circuit's impairment of the First Amendment interests of speakers is improper. The Court should grant review to examine and correct the flawed analysis from which it stems.

II. THE BROAD, UNBOUNDED HOLDING BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND PRESENTS AN IMPORTANT ISSUE OF LIBEL LAW WARRANTING THE COURT'S REVIEW.

The Ninth Circuit's opinion represents an unsound application of this court's libel jurisprudence to the facts of Petitioner's case. The opinion below holds that a writer may deliberately fabricate quotations and place those quotations in the mouth of a public figure as long as the

fabricated quotations are "rational interpretations" of "ambiguous" remarks actually uttered by the public figure or do not alter the "substantive content" of unambiguous statements that the public figure has made. App. A at A-10-11.

In arriving at this holding, the Ninth Circuit claimed to rely upon guidelines supplied by this Court in determining when actual malice may be inferred from evidence showing misleading editing. The appeals court also sought guidance from other federal and state appellate courts which have previously had to face the problem of defamatory misquotations. However, the result reached, and the theory developed to support that result, so far exceed the tolerable boundaries that this or any other court has been willing to extend to false speech that it may be properly viewed as unprecedented.

In recent years, the issue of deliberate quote alteration and falsification has been an integral feature of several notable libel suits.[3] *See e.g., Westmoreland v. CBS, Inc.*, 596 F. Supp. 1170, 1175 (S.D.N.Y. 1984) (involving editing and distortion of various interviewees' remarks to support conspiracy theory); *Selleck v. Globe Intern., Inc.*, 212 Cal. Rprt. 838, 844 (Cal. App. 2 Dist. 1985) (falsely ascribing statements to father of Hollywood celebrity); *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446, 450-452 (3d Cir. 1987) (fabricated quotations attributed to mayor through inadequate language translation). Concurrently, a watershed in modern journalism has occurred through the rise and influence of writers who practice what has come to be known as "the

[3] At common law, an inaccurate quotation constituted libel of the person purportedly being quoted if the quotation was false and the attribution of it to the person placed him in disgrace. *See e.g., Spence v. Funk*, 396 A.2d 967, 970 (Del.Supr. 1978) citing *Rice v. Simmon*, Del.Ct. of Err. and Apps., 2 Harr. 417, 429 (1836); R. Sack, Libel, Slander, and Related Problems (New York, Practising Law Institute 1980) at II.4.9, "Inaccurate Quotation," and cases cited therein.

New Journalism."[4] A decision by this Court on the precise standards to be applied will resolve differences among courts, provide clear guidance to the press and thereby lead to greater predictability in judicial administration of the law of libel.

Conversely, failure to grant review of the Ninth Circuit's ruling will perpetuate existing divisions on an issue of manifest importance to libel plaintiffs and defendants and impair the effective operation of the libel scheme established by this Court.

A. The Ninth Circuit's Holding Undermines The Appropriate Constitutional Balance Developed By This Court In *New York Times v. Sullivan* And Its Progeny Between The Need For Vigorous Public Discourse And The Need To Redress Injury To Citizens Wrought By Deliberately False Speech.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), this Court undertook an important step in placing limits upon the application of state libel law. Under the federal constitutional rule announced in the case, a writer sued for libel by a public official could no longer be held liable for merely publishing a defamatory falsehood which caused injury to the plaintiff's reputation. Concerned that State rules of this kind would deter protected speech on maters of public concern, the Court held that liability in such circumstances could only be premised upon a finding of "actual malice," defined in constitutional terms as publishing knowing falsehoods or in reck-

[4] Whereas traditional journalism is characterized by a preoccupation with facts and events, the object of the "new journalism" is to interpret public affairs through a particular point of view. It therefore eschews the traditional journalistic role of being a neutral finder and conveyor of information. *See generally*, Weaver, "The New Journalism And The Old," *The Public Interest* 67 (Spring 1974).

less disregard of the truth of the challenged libels. *Sullivan*, 376 U.S. at 280.

The Court recognized in *Sullivan* that by increasing the legal protection afforded freedom of speech, it was necessarily diminishing that vouchsafed individual reputation. *Sullivan*, 376 U.S. at 272 ("Whatever is added to the field of libel is taken from the field of free debate.") (quoting *Sweeney v. Patterson*, 76 U.S. App. D.C. 23, 24, 128 F. 2d 457, *cert. denied* 317 U.S. 678 (1942)). However, because of the central position that free speech occupies in maintaining an enlightened electorate and because of a genuine concern that outsized money awards in libel suits would stifle public debate, the Court concluded that the States' power to protect individual reputation had to be limited.

The purpose of the actual malice requirement was not to protect harmful falsity from punishment (assuming the constitutional liability standard is met), but to protect the press from intimidation or annihilation by huge damage awards. Accordingly, the Court expressly declined to adopt the view of certain of its members who urged that the press be afforded an absolute immunity to defame public officials. Instead, Justice Brennan's majority opinion struck an appropriate balance between the need for writers to be able to discuss matters of public concern in an uninhibited manner and the competing need of defamed public officials to protect their reputations from unjustified harm.

A substantial expansion, modification, and refinement of the libel scheme outlined in *Sullivan* has occurred over the past twenty-five years. However, one bedrock principal has remained constant: defamatory falsehoods made with actual malice are always actionable.

Early in the development of the actual malice rule, Justice Brennan, speaking for the Court in *Garrison v.*

Louisiana, 379 U.S. 64 (1965), explained the substantial policy reasons for limiting speech in this fashion:

> Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public figure, should enjoy a like immunity. . . . Calculated falsehood falls into that class of utterances which are "no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." Hence, the knowing false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

379 U.S. at 75.

Thus, when this Court enlarged the constitutional protections afforded writers to comment upon the activities of "public figures," and, briefly, "issues of general or public concern," it steadfastly refused to retreat from the position that calculated falsehoods would remain actionable. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). *Cf., Linn v. Plant Guard Workers*, 383 U.S. 53 (1966) (despite existence of weighty federal policies favoring uninhibited debate in the context of labor disputes, neither union nor management may intentionally circulate defamatory falsehoods).

Similarly, the Court's landmark decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) re-emphasized the rule that calculated or reckless lies must remain actionable. Such statements, being false, not only have "no constitutional value," but also actively undermine the premises of democratic government. 418 U.S. at 340.[5]

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[5] Moreover, Justice Powell's opinion for the Court in *Gertz* cited access to the media as one of the principal rationales for holding public figures to the onerous actual malice standard:

See also McDonald v. Smith, 472 U.S. 479 (1985) (constitutional right to petition the government for redress of grievances does not allow one to libel public officials with impunity).

The Court's adherence to the "actual malice" rule has continued undiminished to the present day. See, *e.g.*, *Harte-Hanks Communications, Inc. v. Connaughton*, —— U.S. ——, 109 S.Ct. 2678, 2698 (1989) (press retains only a qualified immunity to comment upon the activities of public figures). Thus, while this Court's decisions extending First Amendment protection to writers clearly demonstrate the need for free and unhibited discussion of public debate

> . . . there is also another side to the equation; we have regularly acknowledged the "important social values which underlie the law of defamation," and recognize that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation."

Milkovich v. Lorain Journal Co., 58 U.S.L.W. at 4851.

It is precisely this bedrock rule that the Ninth Circuit has seen fit to ignore. In place of the scrupulous balance which this Court has rigorously maintained between the competing values of free speech and the individual's right

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The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individual's normally enjoy.

Gertz, 418 U.S. at 344. However, if courts now afford the press wide latitude to distort what public figures say, it may likely prove an exercise in futility for them to seek to correct damaging falsehoods by means of "self-help."

to the protection of his reputation—a balance which has always enabled public figures to sue over calculated lies —the Ninth Circuit has conjured up two new constitutional rules by which it would allow writers to publish defamatory falsehoods about public figures *with actual malice* and yet escape liability for any harm inflict. The two escape mechanisms devised by the appeals court are (1) its so-called "rational interpretation" rule and (2) its "substantive content" rule.

Both rules bar a public figure libel plaintiff from maintaining a cause of action whenever a writer attributes fictionalized quotations to him that are reasonably related to something he did not say, but might have, or to something he did in fact say, but in an ambiguous manner. This is so even if, as here, it is "uncontroverted" that the quotations at issue were fictionalized and if it is assumed that they were made with actual malice.

However, this Court has previously employed the actual malice rule to hold journalists accountable for fabricated facts and statements misattributed to other individuals. For example, in *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974), the Court affirmed a jury finding that a newspaper reporter had published knowing and reckless falsehoods about a Kentucky family, the Cantrells, the father of which had been killed in a bridge collapse. In reaching this result, the Court noted that the reporter has fabricated parts of his story in order to imply to readers that he has seen and spoken with Mrs. Cantrell, when in fact he had not. *Id.* at 253. Although the *Cantrell* case involved an action for false light invasion of privacy, the holding is equally applicable to the facts of Petitioner's libel case.[6]

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[6] The major elements of a false light cause of action are similar to defamation. The statement must be made public, it must be of or concerning the plaintiff, it must be unprivileged, and it must be false. While a false light tort is distinguished from libel by the additional requirement of "offensiveness" to a person of ordinary sen-

The Ninth Circuit's ruling stands as an open challenge to previous rulings by this Court. Review is thus warranted in order to correct a holding which clearly undermines the Court's libel jurisprudence

B. The Rationale Underlying The Court Of Appeals' Holding, Which Extends First Amendment Protection To Writers Who Intentionally Fabricate Quotations, Is Unsound.

The Court of Appeals found it to be "uncontroverted that Malcolm fictionalized certain quotations and attributed them to Masson." App. A at A-31. It further assumed, as it was compelled to do by the applicable standards governing appellate review of summary judgment dismissals, that respondents had "deliberately altered" the disputed quotations. App. A at A-5. It nonetheless held that the false and defamatory words which respondents attributed to Masson were not actionable.

In reaching this conclusion, the appeals court reasoned that although "a factfinder may infer actual malice from a fabricated quotation when the language attributed to the plaintiff is *wholly* the product of the author's imagination," the First Amendment nevertheless fully protects writers who intentionally decide to fictionalize another person's remarks "under certain circumstances." App. A at A-10 (emphasis added; citations omitted). As noted, the lower court broadly defined the circumstances under which writers would be afforded immunity from liability for fictitious quotations as occurring whenever a writer demonstrates that the fabricated quotations:

> . . . are either "rational interpretations" of ambiguous remarks made by the public figure, . . . or do

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sibilities, this element has not proven to be of constitutional import in this Court's treatment of the tort and its impact upon free speech. *See e.g., Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) (applying *Sullivan* actual malice standard to false light privacy action dealing with publication about a legitimate matter of public concern.)

> not "alter the substantive content" of unambiguous remarks actually made by the public figure. . . .

App. A at A-11.

The lower court offers no convincing rationale to justify its holding. It casually redefines the well established meaning of what quotation marks signify—ruling, as the dissent below noted, that allegedly direct quotations are henceforth entitled to be considered "merely an extrapolation of the speakers words character"—without once pausing to reflect upon the far-reaching consequences of its action. App. A at A-33.

Had the court done so, it might have noted the inescapable ambiguities inherent in the test it employed to "define" non-actionable quote fictionalization from actionable quote fictionalization. The court provides no clear guidelines for distinguishing between the two and none is possible since the test turns upon such inherently subjective evaluations as what statements may constitute a "rational interpretation" of, or be "substantively similar" to, remarks that another person has made. *Cf., Falwell v. Flynt*, 108 S.Ct. 876, 881-882 (1988) (lack of ability to lay dow a "principled standard," due to "inherent subjectiveness" of standard, renders proposed test for statements inflicting intentional distress defective).

Consider the lower court's application of its test to one of the many fabricated quotations that form the basis of Petitioner's case: Malcolm's fabricated quotation of Masson's alleged boast that he would have turned the Freud house into "a place of sex, women [and] fun." The phrase is entirely Malcolm's; it is nowhere to be found on the tape recordings she made in her interviews of Masson. However, the lower court found that because Masson had spoken of giving parties at the Freud house on one occasion and had discussed the promiscuous lifestyle he had led in his youth on another, Malcolm was entitled to make "rational interpretations" of these state-

ments in order to produce the "sex, women [and] fun" quotation.

It hardly needs stating how the rationale employed below could be used to sanction malicious character assassination so long as a writer is capable of arguing with a straight face that the defamatory quotations he has falsely placed in the mouth of his victim "flow from" actual remarks the victim has made at some point in his life.

The justification proffered by the appeals court, such as it is, was properly characterized by Judge Kozinski as "explosive":

> What the court is saying, in effect, is that if you make statements that could reasonably be construed as boastful or arrogant (or callous or stupid or reflecting any other trait of character or intellect) the reporter may attribute to you any other statement reflecting that same trait.

App. A at A-39. A more appropriate test for distinguishing actionable from non-actionable quotes would be the five-part test suggested by the dissent below.[7] This Court should therefore grant the petition in order to clarify what the appropriate test should be.

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[7] The five-step test which Judge Kozinski proposes be used in fictitious quotation cases asks:

> (1) Does the quoted material purport to be a verbatim repetition of what the speaker said? (2) If so, is it inaccurate? (3) If so, is the inaccuracy material? (4) If so, is the inaccuracy defamatory? (5) If so, is the inaccuracy a result of malice, *i.e.*, is it a fabrication or was it committed in reckless disregard of the truth? If the answer to any of these questions is no as a matter of law, the inquiry stops and the defendants win. If they could all be answered yes, . . . the matter [is sent] to the jury.

App. A at A-69-70. In place of the dissent's inquiry, which is clear, logical and easily applied by trial judges, the majority below offers its "rational interpretation" examination, a test so arbitrary and subjective in nature that it invites confusion.

CONCLUSION

The First Amendment to the Constitution does not protect writers who deliberately fictionalize quotations. The right to doctor quotations is not essential to the operation of a free press. A writer's use of fictitious quotations may, as in the present case, cause serious reputational harm. Moreover, fictitious quotations deceive the reading public, lessen press credibility, and distort the collective search for truth.

For these and for all the reasons set forth above, *amicus* urges that petition for a writ of certiorari be granted.

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